Supreme Court of the United States,

OCTOBER TERM, 1874. No. 205. 13

PEYTON GRYMES.

APPELLANT,

vs.

GEORGE S. REPPLIER AND JAMES LANIGAN,

APPELLEES.

COUNTER STATEMENT AND BRIEF OF THE ARGUMENT

ON BEHALF OF

JAMES LANIGAN, Appellee.

BALLANTYNE BROTHERS AND CO.

Supreme Court of the United States:

OCTOBER TERM, 1874. No. 138.

PEYTON GRYMES,

APPELLANT,

vs.

GEORGE S. REPPLIER AND JAMES LANIGAN,

APPELLEES.

Brief on behalf of James Lanigan,

ONE OF SAID APPELLEES.

COUNTER STATEMENT.

The statement of the case contained in the brief filed, for the Appellant, is not concurred in. It is an *argument* made upon a very partial view of the evidence, and intended to present the facts as nearly as possible, as the exigency of the Appellant's case requires that they should be made to appear.

It is, perhaps, impossible, in a case coming before the court, as this does, without any finding of the facts in detail, by a Master or otherwise, that the court should have a wholly unbiased and unvarnished statement of them; but the decree of the court below was, of course, based upon a finding of all the facts necessary, in the opinion of that court, to support it; and it is respectfully submitted that the Appellate court will assume that the evidence warranted such finding, unless it can be shown to be manifestly incorrect; and that, upon any doubtul questions of fact, if any, the presumption must be in support of the decree below. The following, however, is respectfully

presented as a complete statement, from the whole evidence of all that is necessary for a full understanding of the points involved, and which will be found, it is believed, to be a fair deduction from the entire evidence as spread upon the Record.

Peyton Grymes, the Appellant, was the owner of the land in Orange County, Virginia, out of which this controversy arises. R. H. Catlett was connected with him by marriage, and was engaged, with others, in business as an agent for the sale of lands in said State. In the line of his business, he applied to Mr. Grymes for authority to sell the land in question; he was authorized to do so, and, in the first instance, was promised as compensation, in case he might make sale, so much of the price which he might obtain as would be in excess of $20,000; but subsequently, and pending negotiations by Mr. Catlett with the Appellees, the Appellant—further to stimulate his efforts—added an offer to give said Catlett, should he succeed in effecting a sale, a commission at the rate of ten per centum upon the sum of $20,000, which said commission, however, when it was subsequently proposed by Dr. Grymes that Mr. Catlett should deduct it from the instalment, which, as hereinafter stated, was paid over, he (Mr. Catlett) declined to receive, upon the ground that he had practically concluded the sale to the Appellees before the Appellant had made him the offer of increased compensation. Upon these facts, it is claimed that Mr. Catlett was the agent of the Appellant for the sale of this property, with full authority and power to bind his principal by all acts and declarations of said Catlett in the premises. His authority to receive the purchase money was subsequently reduced to writing, and is contained in a letter of attorney, which is printed at page 32 of the printed abstract of record, and is there designated as "Exhibit B., R. M. B."

This letter of attorney, if there could be doubt of the prior existing power of Mr. Catlett to represent the Appellant in the premises, was fully confirmatory of that power; but there can be no doubt of it, for throughout the transaction, the Appellant was fully informed that Mr. Catlett was treating with the Appellees, and, by every possible means, indicated his acquiescence in his so doing.

Early in the spring of the year 1866, James Lanigan, one of the Appellees, and a citizen and resident of Pennsylvania, was traveling with Mr. Howell Fisher, a man of extensive information and experience in regard to mining and mining properties. Mr. Lanigan had other business with Mr. Catlett, and, in the course of conversation between them, the latter mentioned the Appellant's property to the

former, as one which he thought it would be advantageous for him to purchase, and described it to him as valuable gold-bearing land. Mr. Lanigan declined to delay his return for the purpose of visiting the property; but, at his suggestion and on his behalf, Mr. Fisher remained with Mr. Catlett for that purpose. The land in question, which was known, and will be hereinafter referred to, as the "Vancluse property," could only be reached by a drive of several hours from Orange County Court House, at which Mr. Catlett, and near which Dr. Grymes, resided. By Mr. Catlett's suggestion and request, and with Dr. Grymes' knowledge, a son of the latter drove Mr. Catlett and Mr. Fisher to the Vancluse property, where they arrived after sunset and late in the evening. They spent that night in a house upon the land in question, and, upon the next morning at day-break, the son of Dr. Grymes informed the other two that he had made arrangements to have them met, at or near a certain shaft, by Mr. Hume, a grandson of the wife of Dr. Grymes, who had been, for some time, engaged, by permission, in washing for gold upon the property, and who would show it to them whilst he, the younger Mr. Grymes, would employ himself in feeding and harnessing his mules, so that Mr. Fisher's desire for a speedy return might be gratified. Mr. Hume was met at a point near the shaft referred to; and there his examinations, with a view to determining the value of the land as a gold mining property, were made. Mr. Hume himself testified that he then believed the shaft in question, and certain veins of gold bearing rock, to be upon the Vancluse property. Mr. Fisher has sworn, and Mr. Catlett also, that such was the understanding of all parties at the time; and it is now asserted, as a just inference from all the evidence, and as that which, it is believed, was drawn by the court below, that Mr. Fisher and Mr. Catlett never doubted, and that it was always assumed in all conversations between them, or by them, or either of them, with Dr. Grymes and his son, Peyton Grymes, Jr., and Mr. Hume, or with any or either of them; that the said shaft and the said gold veins were upon the property in question. At least it cannot be doubted that Mr. Catlett, who was the agent in the sale, and Mr. Fisher, who was the agent in the purchase, firmly believed so; and without assuming, upon no sufficient evidence, that both those gentlemen have been guilty of perjury, it cannot be questioned that the sale resulted from the impression made upon Mr. Fisher's mind, that the purchase would include the shaft in question, and the veins referred to.

Upon the report made by Mr. Fisher, in accordance with the

understanding of Mr. Catlett and himself as to the position of the shaft upon the property, and after a visit of Mr. Catlett to Philadelphia, and interviews by him with Messrs. Lanigan and Repplier, in which that understanding was confirmed, as indeed, up to that time, it had never been questioned or doubted; the Appellees agreed to buy, and Mr. Catlett, for his principal, the Appellant, agreed to sell the said Vancluse property for the sum of $25,000, one-half to be paid in cash, and the balance to be secured by a bond of the purchasers. The sale was consummated upon these terms; the deed being placed in escrow in the hands of a third party, its delivery to await the payment of the purchase money bond, and the cash payment of $12,500 was made, and the bond for the same amount was executed and delivered.

Up to this time neither Mr. Lanigan nor Mr. Repplier had seen the property which they had purchased; but they both assumed, and had no reason to doubt that it was as it had been represented to them by Mr. Catlett and Mr. Fisher. Subsequently they visited the land together; and, in walking over it, were accompanied by Mr. Hume, before referred to, and by a Mr. Johnson, who had resided for a long time in the neighborhood, and who was well acquainted with this Vancluse farm. The Appellees had bought the property solely as a mineral one, and had been induced to take it by the representations, upon which they fully relied, touching the shaft and veins aforesaid; and, accordingly, their attention upon this visit, was chiefly directed to that shaft, which, however, they then, for the first time learned, and from Mr. Johnson, was beyond the line of their purchase. This information appears to have been given to them by Mr. Johnson with some natural reluctance, as he was a neighbor and old acquaintance of Dr. Grymes, and its correctness was disputed by Mr. Hume. The Appellees, believing Mr. Johnson's statement to be probably correct, as he seemed well-informed, was positive in his assertion, and had no interest in making it; determined at once to demand that Dr. Grymes should return the money which they had paid, and release them from a contract into which they had been led, either by a fraudulent scheme, or by mutual mistake of fact. Accordingly, Mr. Lanigan proceeded at once to the house of Dr. Grymes, for the purpose of insisting upon his rights and those of his co-purchaser; but he was there told that Dr. Grymes was sick, and could not see him. Afterwards, Mr. Catlett was also informed of the discovery that the lines of the Vancluse property did not include the shaft, and, under date of July 13, 1866, wrote to Mr. Repplier that "such a statement would be most astounding if it

was true; but I have no hesitation in saying it is perfectly absurd. Dr. Grymes sold off the property to Mr. Smith, now claimed in part by Slaughter & Co., and after the sale was made had his own tract surveyed, and the survey was the one furnished by him to Mr. Fisher and myself. If there is a man living who ought to know the limits and boundaries of his own property, Dr. Grymes is that man. I learn that Mr. L. went from Vancluse to Orange C. H., and I wish, for his and your own satisfaction, he had brought the matter at once to the notice of Dr. G. As absurd as the statement is, it should be attended to at once. I should have written to Dr. G. immediately, but for the fact that I have been expecting to go to Albemarle for several days, and I thought I could either see Dr. G. or Mr. Williams as I passed through Orange. I shall leave on Monday for Albemarle, and will have this matter at once attended to."

The course and conduct of Mr. Catlett continued, throughout, to be in accordance with the tone of the letter from which the above quotation has been made, and in support of the position and rights of the Appellees; and they, having no knowledge whatever of Dr. Grymes, other than that derived from Mr. Catlett, had no reason to doubt that his confidence, that the Appellant would not endeavor to hold them to a contract under such circumstances, would prove to be justified.

Mr. Hume was left in possession of the property: and afterwards, in September, of the same year, by Mr. Bowman (a geologist and mineralogist) the Appellants caused such examinations to be made as were, in his judgment, necessary to settle, beyond question, that the gold veins, which had been represented to be upon the land, were not within its boundaries as determined by a survey made for the purpose of ascertaining their limits.

But Dr. Grymes finally refused, notwithstanding the expectations and efforts of his agent, Mr. Catlett, to make an amicable rescission of the contract; whereupon the Appellees declined to have anything further to do with the property and filed the bill in equity, which originated these proceedings, wherein, upon bill, answers and proofs, the court below entered the decree, which the Appellants now seek to have reversed.

BRIEF OF ARGUMENT.

Neither the assignment of error, nor the brief in support of it, indicates any particular fact, in relation to which the learned court is alleged to have erred; and therefore it will be presumed that they correctly found the existence of all facts necessary to the decree.

It has not been, and cannot be, contended that no state of facts could exist upon which the decree below might stand; but only that it cannot be maintained upon the statement which the Appellant has submitted. Consequently, the questions presented to the Appellate Court are, unfortunately, but necessarily, mainly questions of fact, and the record is voluminous. By whom, and how, should such questions, upon such a record, be placed before this tribunal? The first branch of this inquiry has been authoritatively answered in *Canal Company* vs. *Gordon*, 6 Wall., 561 (~~5, 6, 8,~~) where it was said: "It is the Appellants who complain. The questions which we are to examine are such as they present for our consideration. The position of an Appellee in this court is simply defensive." As to how an Appellant should present questions of fact for consideration by this court, it may be preliminarily remarked, that a direct finding by an inferior court itself is entitled to at least, as much weight as that of a master; and, this premise assumed, the conclusion follows that it is not enough to allege error in general terms merely, but the *particulars*, upon which depend the existence of the error alleged, should be distinctly indicated; so that the Court may, understandingly, decide upon *each point* in dispute, without being required to grope through the whole evidence for a knowledge of the issues which arise from it, or to follow the Appellants in a vague search of the entire record for something in its parts, which, being arbitrarily severed, or connected, may justify a general doubt or give color to indefinite debate. Thus, in *Greene* vs. *Bishop*, 1 Cliff., 186, it was held that an exception to the report of a master, based upon an allegation that he had reached a wrong conclusion upon the evidence, without pointing out any specific portion of the testimony to support the allegation, was not sufficient to put the finding of the master in issue, or to require the court to review it and enter at large into the evidence, in order to ascertain whether the

master's finding had been erroneous. That the finding of a master is as conclusive in this as in a lower court, was said in *Canal Company* vs. *Gordon*, (*supra*). It is the settled practice of courts of equity not to set aside a master's report of facts, except upon *proof* of clear mistake in a point material to the result; and *the burthen of proof* of such mistake is upon the party alleging it: *Mason* vs. *Crosby*, 3 W. & M. 258.

It cannot be doubted that, were this case before the court upon exceptions to the report of a master, in which the facts had been specifically found, they would not be reviewed in the absence of distinct averments of the particular mistakes alleged, and it will hardly be disputed that a direct finding by the court below, would be here considered with, at least, as great respect as if made by a master. But it may be argued that this position cannot be well taken in a case like the present, where there has been *no* finding of the facts whatever, other than such as must have been arrived at, although not stated by the court below, as the basis of the decree; and that in the absence of a specific finding of the facts, distinct averments of particular mistakes cannot be made. But it is respectfully submitted that the practice, to which reference has been made, is *not* inapplicable to such a case as this; for a case so presented is especially within the mischief which it was established to remedy: and that it *was* possible for the Appellant to conform to that practice. The mischief was the unreasonable imposition upon the court (and especially upon an Appellate Court) of the labor and waste of time involved in the examination of voluminous records, to determine, *de novo*, questions of fact; and in this case, the Appellant might readily have relieved the court by substituting for the general suggestion of mistake implied in his Brief, distinct allegations of the existence, or non-existence, of the several particular facts, upon the presence or absence of which he might suppose the support of his averment of errors to depend, accompanying such allegations in each instance, with all (instead of parts) of the evidence upon the particular point. Such a course would have been in conformity with the reported cases, to which reference has been made, and would have saved to the court the trouble (should it consent to assume it) of examining the *whole* record of 114 printed pages to discover, without the aid, which specific allegations should have afforded, whether *any* error has been committed.

The brief of the argument, on behalf of Appellant, is ~~arrayed~~ arranged in four divisions: the first three of which only require attention, and will now be considered in the order of their presentation.

1. As to the right, generally, of the Appellees, upon the allegations and proofs, to the relief granted by the decree below.

The burthen of proving error under this head, as at all points, being upon the Appellant, a general discussion of the law relating to rescission of contracts will not be intruded upon the court, but an effort will be made merely to follow and review the argument of the Appellants. It begins by citing *Kimball* vs. *West*, 15 Wallace, 379, and quotes a portion of the opinion of the court in that case. It is, however, only necessary to present it more fully, to show that it is authority against, and not for the Appellant. In the reporter's statement of the case, it is said that "it appeared from the record, that, before the cause in the court below, came to a final hearing, the defendant purchased the outstanding, and conflicting title to the one hundred and eighty-four acres, and tendered to the complainants such conveyances as made their title perfect. The court, *therefore*, dismissed the bill, but decided that the defendant should pay the costs of the suit." So it appears that the vendor in that case having failed, before suit brought, to make good title to a portion of the land, which he had sold, the vendee filed his bill in Chancery, upon that ground to rescind; and *because* the defendant, before hearing, acquired and tendered to plaintiff complete title to the whole land in question, the court dismissed the bill on payment of costs by defendant. Such were the circumstances of the case, and the decree from which the appeal was taken; and in affirming it, this court said, in addition to what has been printed in Appellant's brief, "when, therefore, it appears that, at the time of the hearing, the defendant is able to remedy the supposed defect in his title, and in point of fact secures and makes good to the complainants, at his own cost, all that he conveyed to them originally, the complainants must show some loss, injury, or damage by the delay in perfecting the title; before they can claim a rescission of the contract." The facts of that case were essentially different from those now before the court; but so far as the principles there enunciated have any present application, they are, it is respectfully submitted, in support of the decree below. So also as to the case of *Atwood* vs. *Small*, 6 Clark & Finelly, 497; which is next referred to in Appellant's brief. The facts, which the decision there turned upon, differ

most potently, from those of this case. The result there was made to depend upon the familiar principle, that a representation which is not relied upon, and which, therefore, does not give rise to the contract, is not in general, ground for rescission. But, upon this record, it is clear, beyond doubt, that the shaft and veins were represented to be upon the Vancluse property: and it is more than once distinctly sworn to, and no where in the evidence denied, that solely upon such representations the Appellees made the purchase. Neither they, nor their agent, Mr. Fisher, *could* have exercised their own judgments as to the boundaries of the land; and from the nature of the subject, they *necessarily* accepted information derived from others. Without, by any means, yielding the position that the representations in question were made by or in the presence of the Appellant himself, and certainly without correction by him; the attention of the court is respectfully directed to the fact that Mr. Catlett was the agent of the Appellant for the sale of the property, and that *he* certainly believed, and asserted, that the shaft and veins in question were located upon it. It is also certain that Appellant's son was selected by Appellant's agent (Catlett), and, at least, with the knowledge of Appellant himself, to show the property, and that he, with Catlett's approval, obtained Mr. Hume to meet Mr. Catlett and Mr. Fisher (agent of the Appellees), and take them over the land, and that Mr. Hume believed and led Mr. Fisher to believe, that the shaft was part of it. In all this Mr. Catlett participated. He was the agent of the Appellant, with power, as will hardly be questioned, to exhibit and set forth to a prospective vendee, the thing which had been confided to him for sale. Whether, therefore, Mr. Hume and the younger Mr. Grymes were, or were not, in making the representations in question, the agents of the Appellant (which it is submitted they were), it is enough, for the purpose of this argument, that Mr. Catlett, who certainly was such agent, assented to, reiterated and adopted their statements.

A party dealing with an agent, who is acting within the scope of his authority and employment, is to be considered as dealing with the principal himself. If it is a case of contract, it is a contract with the principal. If the agent at the time of the contract, makes any representation, touching the matter of the contract, it is treated a representation of the principal himself: Story on Agency, sects. 6 135 and 139. *Hallhemier* vs. *Brinkerhoff*, 4 Wend., 394; *Hubbard* vs. *Ellmer*, 7 Wend., 446.

What has just been said renders unnecessary any special notice

of the cases cited at the foot of page 28, and at the top of page 29 of Appellant's brief.

As to the argument for Appellant, based apparently upon the assertion that a case of *mutual* mistake is not presented, because (as he says) no mistake was made by the vendor, it is replied that the vendor's own knowledge and even aid in the creation of the impressions under which the vendees acted, is clearly inferable from the evidence; and that his agent or agents, knew of the erroneous belief entertained by the Appellees, and shared it with them, was fully established. If there be doubt of the mutuality of the mistake, it arises only upon contemplation of the alternative of mistake upon the side of the vendees and fraud upon the other.

This contract has not (as Appellant's argument assumes) been fully executed, nor the deed accepted. An instrument deposited with a third person to hold till some condition be performed, is not delivered as a deed, but as an *escrow;* 2 Blackstone's Commentaries, page 307. "The delivery of a deed as an escrow is said to be, when one doth make, and seal a deed, and deliver it unto a stranger, until certain conditions be performed, *and* THEN *be delivered to him to whom the deed is made, to take effect as his deed:*" Shepherd's Touchstone, p., 58. The delivery of the escrow in this case, has never been followed by delivery of the deed to the grantees. The contract of purchase, therefore, including, of course, the obligation to deliver, and so *complete*, the deed, has never been fully executed; and the very purpose of this bill was in part to obtain relief against enforced completion of an agreement, which, as to the delivery of the deed and payment of one-half of the purchase money, remained, and still remains, executory.

2. The argument next made by Appellant, based upon the assumption of negligent delay on the part of the Appellees in asserting their rights, may, perhaps, be best answered by a simple reference to the record, from which it will appear that one of the vendees, immediately upon their first discovery that the shaft was not upon the land which they had bought, sought the vendor for the purpose of claiming a rescission; and from that time, at which information was given that the Appellant was sick, and therefore, the purpose of the visit was delayed, the Appellees exercised no acts of ownership further than such as were necessary to determine the full extent of the deception which (innocently or otherwise) had been practised upon them; and having

done this, they subsequently and without the intervention of a period of time sufficient to raise a presumption of their adoption of the contract after discovery of the mistake or fraud, informed Mr. Catlett, the agent, with whom their dealings had almost exclusively been had, of their unwillingness to consummate or stand by a contract which, in the event, had proved to be something entirely different from that which was contemplated: and it was only in consequence of the response of Mr. Catlett, in which he assumed that his principal (the Appellant) would not seek to profit by a mistake (which he assured the Appellees that this must be), that they refrained from instituting legal proceedings for a length of time sufficient to reasonably satisfy them that the agent's estimate of his principal's character could not be relied upon.

3. The remaining contention for the Appellant invokes, but fails to apply, the general principle that equity will rescind a contract only where, upon rescission, the parties can be placed in *statu quo*. But general rules are always subject to qualification, and to be modified by reference to other rules; for, as is said by Domat, (Domat's Civil Law by Strahan, Preliminary Book, sect. 2, art. 2,) if it happens that a rule "being applied to some case which it seems to include, there follows from such application a decision contrary to equity, we must from thence conclude, that the rule is not rightly applied, and that it is by some other rule that this case ought to be judged." In the present case it is respectfully submitted that the rule relied upon by Appellant, if unqualifiedly applied to this record, would be violative of equity, and of those rules which allowed to the Appellees sufficient time for the complete examination of the property proposed to be conveyed to them, and such occupation of it as was requisite for that purpose.

Again, however, the question is one of fact rather than of law, and the court must be asked to determine, from the record, whether the decree below did not really and substantially place the parties in *statu quo*. All that was done by the Appellees was to make the investigation to determine the question of mistake, and the plaint or pretence of inquiry, arising to the Appellant theref that the examination, made by the Appellees, caused any intr to the property, but that it rendered less easy a sale, to other parties, founded upon a belief in value which did not exist, and as to the alleged decay of the property, if any has occurred, it is respectfully submitted that it resulted after the Appellees had rightfully refused to retain it, and had thrown it back upon the Appellants.

Finally, and upon the whole case, it is deemed proper to repeat that an examination of the record, in connection with Appellant's brief, makes it clearly apparent: that this case presents chiefly questions of fact, upon which the finding of the court below should be conclusive, but as to which the Appellate Court is confidently referred to the evidence at large.

EDWIN L. STANTON,
GEORGE M. DALLAS,
For Appellees.

Supreme Court of the United States

OCTOBER TERM, 1876. No. 7.

PEYTON GRYMES,

APPELLANT,

vs.

GEORGE S. REPPLIER AND JAMES LANIGAN,

APPELLEES.

Counter Statement and Brief of the Argument,

ON BEHALF OF

DALLAS SANDERS, Administrator, d. b. n.

OF THE

ESTATE OF GEORGE S. REPPLIER, deceased,

WHO WAS ONE OF THE APPELLEES.

McGILL & WITHERS, PRS.

Supreme Court of the United States:

OCTOBER TERM, 1876. No. 7.

PEYTON GRYMES,

APPELLANT,

vs.

GEORGE S. REPPLIER AND JAMES LANIGAN,

APPELLEES.

Brief on behalf of Estate of Geo. S. Repplier, deceased,

WHO WAS ONE OF SAID APPELLEES.

The brief, on behalf of James Lanigan, is adopted as part of the present one, and the propositions there asserted and the authorities there cited, are now again submitted and referred to, in connection with those hereinafter added; and, whilst it is still respectfully insisted that it should be presumed that the court below correctly found all facts necessary to the decree, it is deemed proper to supplement the epitome of the evidence contained in the Lanigan brief, with the following more complete

HISTORY OF THE CASE.

Repplier and Lanigan, complainants below, paid to Grymes, defendant below and appellant here $12,500, and jointly bound themselves (p. 18) to pay a further and equal sum, with interest within six months after the date of the bond, as the second and last installment of the purchase of certain real estate. A deed was executed by the vendor and deposited in escrow, and has

never been delivered. Afterwards, the vendees filed a bill to rescind the contract and recover back the first installment of the purchase money, on the ground of serious and material mistake arising out of misrepresentation by Grymes and his agent. The court below decreed (p. 112) that the sale be set aside and annulled, and that the vendor pay to the vendees the sum which had theretofore been paid by them. From this decree an appeal was taken to this court. Pending this appeal, Repplier, one of the appellees died. His representatives as to realty and personalty have since become parties to the suit.

In the brief for appellant in this case, it is expressly or impliedly conceded that Repplier and Lanigan purchased the real estate in suit from Peyton Grymes, Sr., through Richard H. Catlett, the only inducement to the purchase being the supposition that the land was "gold-bearing;" that Fisher, the agent of the purchasers, viewed the land before the sale in company with Catlett, Peyton Grymes, Jr., who is the appellant's son, and Peyton G. Hume, who is a grandson of appellant's wife; that from the time of this visit until several months after one-half of the purchase money had been paid, Catlett, Fisher, Repplier and Lanigan all believed that the tract of land, in question, contained a certain shaft and gold-vein, which in fact it did not contain; that it contains no shaft, and that no gold-vein has ever been discovered on it; and that after Repplier and Lanigan discovered this mistake, and before this suit was brought, Repplier and Lanigan notified the appellant of the mistake, and demanded a rescission of the contract. It is also manifest that Repplier and Lanigan bought the property in order to work the supposed mine, and not for speculative purposes; and that they never, in any way, offered it for sale; Repplier, p. 23; Lanigan, p. 26; Bowman, p. 30; and Catlett's letter of March 12, 1866, before the sale was made, p. 91.

The questions of fact raised in appellant's brief seem to be these:

1. Whether, on the one hand, Catlett purchased the land from Grymes and sold it to Repplier and Lanigan, or, on the other hand, Catlett, in the transaction was the agent of Grymes, who sold directly to Repplier and Lanigan.

2. Whether the mistaken belief of Repplier and Lanigan as to the location of the shaft and gold-vein, in question, was

brought about by anything said or done by the appellant, or by anybody for whose acts or words he was responsible.

3. Whether the conduct of Repplier and Lanigan, after they discovered the mistake, and before they demanded a rescission of the contract, was in point of fact such as to preclude them from obtaining a rescission in a court of equity.

I.

As to the Agency of Catlett.

On this point the averment of the bill (p. 1.) is, that the appellant, through his agent Catlett, proposed to sell the land to Repplier and Lanigan; that when Fisher and Catlett went to inspect the land before the purchase, Catlett was still acting as Grymes' agent; and that (p. 2) the final agreement of purchase was made with Grymes, through his agent Catlett. Appended to the bill is a power of attorney from the appellant to Catlett, in the following words (p. 5):

"Know all men by these presents that R. H. Catlett, of Augusta Co., Virginia, is hereby constituted and appointed my attorney in fact, for me, and in my name, to affix to the deed of sale of the Vancluse property in Orange Co., Virginia, the revenue stamp required by the laws of the United States, and to obliterate the same, and further to collect from Messrs. Lanigan and Repplier the purchase money for the said property, and *for me and in my name* to receipt for the same, and *to do any and all other things necessary to complete and perfect the sale;* and I hereby confirm and ratify the acts of my said attorney in the premises, as freely and effectually as if I was present and acting myself.

Witness my hand and seal, this 27th day of March, 1866.

PEYTON GRYMES."

Endorsed upon this exhibit is a receipt for one half of the purchase money—$12,500—signed "R. H. Catlett, attorney, &c. for Peyton Grymes as per power of attorney annexed."

In his answer, Grymes, admitting that the power of attorney is genuine, says (p. 8) that Catlett applied to him *for the agency*

for a sale of the land, and that to this application Grymes replied "that whenever said Catlett would bring him $20,000, he would give him a deed for the land, *and allow him a commission on the amount.*" He further says (p. 10) that Catlett paid him $10,000 of the $12,500 received from Repplier and Lanigan, and that on receiving the $10,000 from Catlett, he (Grymes) offered to *let him deduct his commission from the amount.* Grymes files with his answer a copy of the deed which he executed to the plaintiffs, but which is still held in escrow (pp. 16 and 17). This deed, signed by Grymes and wife, is made directly to Lanigan and Repplier, "for and in consideration of the sum of $25,000, in lawful money of the United States, to them (Grymes and his wife) in hand paid by the said James Lanigan and George S. Repplier." Catlett was a land agent, having special arrangements touching sales in the county in which the tract in controversy is situated (p. 60), and was connected with the family of Grymes, being the brother-in-law of Peyton Grymes, Jr., the son of the appellant, who lived with the latter, and managed his farm (p. 89). The relations between Grymes and Catlett had long been of the most intimate and affectionate character (p. 87). Upon its face, the intimation that the former dealt with the latter as a prospective purchaser, instead of in the line of his business as an agent to effect the sale of land, is improbable.

Repplier, Lanigan and Fisher all testify that, throughout the negotiation which preceded the sale, Catlett represented that he was acting as the agent of Grymes, and that they dealt with him only as such agent (Repplier p. 22; Lanigan p. 23; Fisher p. 26). Catlett himself says (p. 84) that he acted as the agent of Grymes in making the sale; that he is a member of the firm of Echolls, Bell and Catlett, land agents in Virginia, and acted in this case as a member of that firm; that he had advertised their agency in different newspapers in Virginia, and had distributed their advertising circulars in every direction; and that he believed that Grymes knew he was a land agent. On cross-examination, Catlett (who was put upon the witness stand by Repplier and Lanigan) was asked, "was anything said about your firm—I mean the firm of Echolls, Bell and Catlett—in your arrangements with Dr. Grymes for the sale of the property, or was the arrangement made between you and him personally?" and he

replied: "I do not think I mentioned my firm to him. I had known Dr. Grymes for a long time, and our relations had been of a most affectionate character, and I therefore dealt with him in a different way altogether from my custom of dealing with other parties who placed lands in our hands. I had merely a verbal understanding with him with reference to my agency, instead of taking a written contract as we have done, I believe, in all other cases. (p. 87)."

Peyton Grymes Hume (one of appellant's witnesses and his grandson) who was the guide of Catlett and Fisher when they inspected the land, and, at the time, supposed they were there to look at this property, with a view to its purchase by Fisher or his principals, was asked on cross-examination (p. 50) on what ground he so supposed, and he replied, "having heard that the land had been *put in the hands of a land agent for sale, and seeing Fisher there with Catlett*;" and he goes on to say (p. 50) that this was the report in the neighborhood.

Besides, it appears everywhere in the testimony and in the brief for appellant, that on the afternoon of the day when Catlett and Fisher inspected the land, they went to the house of the appellant, and remained there until midnight; and that during the afternoon and evening, the appellant and Catlett and Fisher and one Williams—who was interested with Catlett in this and other sales in the same county, and who had been sent for by Catlett presumably to aid in persuading Fisher—were discussing the proposed purchase. Now, it being conceded, as it must be, that at that time Catlett considered himself the agent of Grymes in the transaction, and that Fisher, on behalf of Repplier and Lanigan, was dealing with Catlett as such agent, and that Williams took the agency for granted, and expected to share in the commissions, it is impossible to believe that Grymes did not know that Fisher was dealing with him as the owner, and the person from whom Fisher's principals were to buy the property.

II.

As to Appellant's responsibility for the mistake into which Repplier and Lanigan were led touching the location of the shaft and gold-vein.

On examination of the map lately forwarded by the clerk of the court below, in obedience to the writ of certiorari issued

from this court, on the motion of appellees, it will be seen that the land in controversy is in two parcels; one much larger than the other. These two parts are near each other, but are not contiguous. On the ground between them is the shaft in question, known as the "Old Oak Shaft," and the gold-vein reached by this shaft runs therefrom to the northeast and southwest, between the two parcels comprising the land in question, and in no place touching either of them. About in the middle of the larger part is a dwelling house, and near it a barn. It was in this house, then occupied by one Bullard, that Catlett, Fisher and Peyton Grymes, Jr., slept on the night of their visit to the locality. (pp. 53, 26, 101).

All accounts of what took place on the land agree in this, that both Catlett and Grymes, Jr., knew at the time that Fisher had come to that locality upon Catlett's invitation, for the sole purpose of examining the land in controversy; that Fisher was determined to reach Orange Court House, twenty-five miles distant, in time for the northern bound train which passed that point about noon; that in consequence of this determination, the party arose about daylight, and Catlett, Fisher and Grymes, Jr., each understood that but a very short time could be allowed for an examination of the land; that in the morning, when they arose, Grymes, Jr., sent word to his nephew, Hume, who lived on the land, to meet Catlett and Fisher, and act as their guide; that Catlett and Fisher thereupon separated from Grymes, Jr., at or near Bullard's house, and under the direction of Grymes, Jr., proceeded toward the Old Oak Shaft to meet Hume; that Hume met Catlett and Fisher before they reached the shaft, and two or three hundred yards from it, took them to a stream where he was washing gold, and then "led them to the shaft" (p. 50); that less than an hour was spent that morning in the examination of the land; that a very large proportion of this time was spent at this shaft; that Hume at that time believed this shaft to be upon the land which Fisher's principals were to buy; and that neither Fisher nor Catlett was informed that the shaft was not on the land.

What connection had the appellant with these transactions on the land?

In the first place, having long had with him "relations of the most affectionate character," Catlett, his agent, told Lani-

gan, before he took Fisher to the land, that there were shafts upon it, (p. 24) and he continued to so represent and believe till long after the purchase was consummated. Secondly—Grymes, Jr., appellant's son, living with him on his farm near Orange Court House, and managing it for him (p. 53) received a letter from Catlett, requesting him to meet Catlett and Fisher at Orange Court House with a vehicle, to carry them to the land. The appellant knew of the receipt of this letter by his son, and *approved* of his going, as Grymes, Jr. himself states (p. 53); and on the way from Orange Court House to the land, as the party passed near the residence of Grymes, Sr., the latter sent them a plot of the land which had been made for him by a surveyor in 1865 (see testimony of Grymes, Jr., p. 56). Thirdly—Upon the return of the party to Orange Court House, having missed the train, Fisher and Catlett were taken by Grymes, Jr., to his father's house, where they remained until about midnight, and they (Fisher in particular) had several hours' conversation with the appellant. In his answer, in speaking of this conversation, the appellant says (p. 9) that he told Fisher that he was satisfied there was more than one good vein upon this land, "although no vein upon that portion had ever been developed, he having operated upon it for surface gold exclusively." The appellant did not take the stand as a witness. Catlett, Fisher, Grymes, Jr. and William G. Williams were all present during this conversation, or a large part of it, and have all been examined as witnesses in the case. Grymes, Jr. and Williams were put upon the stand by appellant himself. Now all these witnesses agree in this, that Grymes, Sr. did not use any such language as that above quoted from his answer, denying the development theretofore of any vein on the land, and asserting that it had theretofore been operated exclusively for surface gold; or that he said anything to remove from Fisher's mind or from Catlett's, erroneous impression as to the location of the shaft and gold-vein. (Fisher, pp. 27–28; Grymes, pp. 55–58; Williams, pp. 59–60; Catlett is very emphatic on this point, p. 89).

Upon these undisputed facts, can it be doubted that Fisher's mistaken supposition that his principals were buying the shaft and gold-vein, in question, was brought about by the acts and words of the appellant and his agents? The appellant placed

the land in Catlett's hands for sale. Catlett invited Fisher to travel twenty-five miles in a wagon, *to see the property*, which Grymes, Sr. had given him for sale; and simply because the appellant was a man advanced in years, unfit to make such a journey (Catlett p. 87) he, Catlett, wrote to appellant's son who was living with appellant, and managing his farm, to meet himself and Fisher and take them *to see the property*. (Catlett, p. 87.; Grymes, Jr. p. 53.) With his father's knowledge and approval, Grymes, Jr. did meet them and (p. 53) "took them immediately *to the land*." It being dark when they reached the land, they passed the night upon the premises. In the morning, if we accept the statement made by Grymes, Jr. himself (p. 59), he sent Fisher and Catlett to meet Hume, and engaged Hume, whom he supposed to know the general outlines of the land (p. 53), to meet them, sending Hume word to come as early as he could in the morning "to meet Mr. Catlett and Mr. Fisher, and show them *the land*." Hume says, "I met them at a point near the shaft, and that was about where I was surface washing for gold, and called their attention to the rocker, and Fisher examined it. I then *led them to the shaft*, the point that I first met them being some two or three hundred yards from the shaft," (p. 50). So, being on the land he was to show them, he led them off it, Fisher and Catlett supposing they were still upon it. Indeed Hume, himself, says he thought he was still upon the land Fisher came to see, (pp. 45-46). While the party was at the shaft, Grymes, Jr. was hitching his team. He says, "as soon as I hitched up I drove out into the road *nearly opposite the shaft*, and waited until Fisher and Catlett joined me which they did immediately, and we started for Orange Court House," (p. 54).

Therefore, on the showing made by the appellant himself, Fisher went with Catlett to see the land of the appellant, which was offered to Fisher's principals; Catlett with the approval of the appellant, (the latter being himself incapacitated) employed the latter's son to take him and show him the land. The appellant, by giving his son a map of the land, when on the way to it, impliedly, at the least, authorized him to act for him in designating its boundaries. Grymes, Jr. took them to the land and sent for his nephew Hume to show it to them, and Hume led Fisher and Catlett directly to this shaft and nowhere else, ex-

cepting that he showed them a rocker in a stream near by. In other words, on the appellant's own showing, Grymes, Sr., through his agents, invited Fisher to look at the land, and when Fisher accepted the invitation, and was on the land to inspect it, took him away from it to this shaft, and did not tell him that he was no longer upon it; nay, he did more than this; he pointed to another shaft and said that was not upon the land to be sold, leaving Fisher to infer that the shaft they were examining was upon it. (Hume p. 109). It is manifest that Fisher could have come to no other conclusion than that the shaft he had been led to and was examining, and, consequently, the gold-vein, which it tapped, were upon the land he went to see.

The testimony of Catlett and Fisher makes this still clearer. Catlett says: "Mr. Fisher and myself, when we visited the Vancluse property, were told by Peyton Grymes, Jr. that young Hume would show us the property; we met young Hume, who carried us first to see the place where he had been washing for gold, and then went with us to the shaft. . . . I do not remember what transpired at the shaft, or that he said a shaft was on the property; but from his having been sent for to go with us, to show us the property, I took it for granted, and felt certain that the shaft was upon the property, and left there under that conviction. That conviction I entertained until it was ascertained beyond question that a mistake had been made, and that the shaft was not upon the property" (p. 85). Fisher says (pp. 26–27): "At the suggestion of the Doctor's son, we agreed to get up at daylight *to examine the property*, so as to reach the cars in time. We got out of the house just as it was light. We started from the mansion house out the road for one hundred yards or so, when the Doctor's son said he would go for Mr. Hume, who knew about the property, *and would show us the property*, and he would go and harness up the mules. We met Mr. Hume a few moments afterwards; he took Mr. Catlett and I to a small stream to the right of the road going from the house; he pointed out a place on this stream where he was washing, by permission of Dr. Grymes. At the time we were talking on the road, Dr. Grymes' son spoke about a shaft which he wished me to see, and Mr. Hume could show the shaft to us. From the stream Mr. Hume led us directly to the shaft. . . . *The shaft was pointed out*

as a portion of the property they wanted to see." The same witness, in speaking of the location of the shaft within the boundaries of the land in controversy, on the map, says: "The location of the shaft was marked by me in the presence of Mr. Catlett. I am positive it was not on the original map. Mr. Catlett and myself fixed the point marked 'shaft' as the point where the shaft was located" (p. 28). And he again says, when recalled (p. 77): "Mr. Peyton Grymes sent for Mr. Hume. What the message was to Mr. Hume, I have no knowledge. I only know that Mr. Hume met us and appeared to understand that he was to show us the property, demonstrating the prominent points, showing the value of the property as a gold property, and took us to the washing, and finally to the shaft (I am distinct on that point), *and showed us the shaft as upon the property to be sold.* I recollect that he or Mr. Grymes spoke of the timber land, which was disjointed from the farm land some distance, and I answered that I did not want to see that land, that what I wanted to see was the gold land. The timber land was said to be outside of the gold range. . . . I don't recollect distinctly what he said after looking at the washing; he said he would go or take us to the shaft, or something to that effect; at least, it was at his invitation that we went to the shaft. I can't recollect now anything he said or done particularly, but understood from him that this shaft had been worked by his grandfather (Dr. Grymes), and that it was upon the property. This belief and understanding was got from him, but I can't say now what words he used, or did at the time."

III.

As to the Conduct of Repplier and Lanigan after they Discovered the Mistake.

Having had a satisfactory assay made of ore from this shaft, Repplier and Lanigan went to the land. Mr. Lanigan testifies (p. 24) that "four or five months after the execution of the deed, Mr. Repplier, Mr. Bowman, Harry and myself visited the property. We found Mr. Hume, Dr. Grymes' grandson, in charge of the property. We asked him to show us the boundaries, and Mr. Johnson also with us. Mr. Hume

took us to what he called the corner line; that line included the shaft spoken of on the map. After he had pointed out the line to us, Mr. Johnson called me one side, and said that was not the line that Hume was showing us; that he did not want to have any trouble about it." Hume himself says (p. 46) that at the time Johnson made this statement, he, Hume, stated that he was under the impression that the shaft was upon the land which Repplier and Lanigan had purchased. Repplier, in his account of the conversation, says (p. 22): "*A dispute arose* between Mr. Hume and Mr. Johnson as to the line of the property, Mr. Johnson contending that the line was between the mansion house and the shaft, Mr. Hume contending that it was north of the shaft. After listening to Mr. Hume and Mr. Johnson about the shaft in question, my suspicions were aroused, that the shaft in question was beyond the line of the land I purchased. In consequence of this difficulty about the lines, we concluded that Mr. Lanigan should go to Orange Court House and see Dr. Grymes—Major Bowman, my son and myself returning home." He adds, (p. 22) that "Lanigan went to see Dr. Grymes *to ascertain whether the shaft was on the land.*"

Lanigan testifies that he did at that time go to Dr. Grymes' house, and that a young lady there, whom he supposed to be Dr. Grymes' daughter, met him on the porch and said "father was sick and could not be seen." (pp. 24, 68–70).

A feeble effort is made to rebut this testimony by the testimony of Williams, another connection of Grymes, and with whom Catlett divided his commission. Williams says he does not remember hearing of Dr. Grymes being sick at that time, and thinks he would have heard of it, as he passed by the Doctor's house every day (p. 65); but, as against this argumentative testimony, and, in view of the failure of the appellant to testify as to this matter, or to call to the stand the young lady or any other member of his household, it must, we think, be assumed that Lanigan's direct and positive statement must be believed. Whether Dr. Grymes was really sick is another question.

In the brief for appellant this Mr. Williams is styled "the counsel for the vendees." In his testimony, (p. 64) however, Williams says: "I was not acting as an attorney for the

plaintiffs, but rendered the services which I did, because I was interested with Catlett in the sale of the land. Plaintiffs did not pay or offer to pay me any fee, and I never thought of charging them any." Williams is the nephew of Catlett and of Grymes, Jr., (p. 60).

It does not appear that his relationship to the parties, or his interest in the sale, was known to the appellees, or their agent Fisher, either at the conversation about the land before Fisher's report to his principals, or when Fisher first and Bowman afterwards consulted Williams concerning the title.

The visit of Repplier and Lanigan, during which Johnson told them that he thought the shaft was not on their land, was made in June or early in July, 1866, (p. 90) or about three months after the completion of the sale; and of course it was about the same time that Lanigan called to see Dr. Grymes and was told that he was too ill to be seen. Within a very few days after this, Fisher met Catlett, and told him what Mr. Johnson had said. Thereupon, on the 13th of July, 1866, Catlett, Grymes' relation, agent and attorney in fact, wrote to Repplier referring to his conversation with Fisher, and saying: "Such a statement (that made by Mr. Johnson about the location of the shaft) would be astounding, if it was true, *but I have no hesitation in saying it is perfectly absurd.*" He goes on to say that he expects to see Dr. Grymes soon, "and will have this matter at once attended to." The power of attorney, given by the appellant to Catlett, authorized the latter "to do any and all other things necessary to complete the sale"; and at the time one half part of the purchase-money was paid, Catlett represented to Repplier and Lanigan that Dr. Grymes was an honorable man, and if there was anything wrong, he, Dr. Grymes, would refund the money. (p. 70).

This was the state of affairs when in August, 1866, (p. 61) Bowman went to the land, and, on behalf of Repplier and Lanigan, made the explanations about which so much is said in the brief for appellant. Appellant's counsel assume—and here is a fatal error in their argument—that at this time Repplier and Lanigan knew positively that the shaft and gold-vein in question were not on their land. The fact is, as just shown, that the purchasers had had their suspicions aroused by the dispute between

Johnson and Hume as to the location of the shaft; had attempted to see Dr. Grymes, and failing to do so, had notified his agent, Catlett, who had written to them: "I have no hesitation in saying it (Johnson's statement) is perfectly absurd," and had promised to see Dr. Grymes about it (p. 92).

The explorations of Col. Bowman, an experienced mineralogist and geologist, were in search of other gold-veins which had before the sale been represented to exist on the land; (See Bill of Complaint, p. 4; Repplier, p. 23; Lanigan, p. 24; Fisher, p. 27; Bowman, p. 30.) Before entering on his explorations, he notified Dr. Grymes of his purpose, and at the same time told the appellant of the information received by Repplier and Lanigan as to the shaft not being on the tract sold to them, and that if his explorations for the veins, represented to exist on the land, should be without success, the second payment would be refused and reimbursement demanded of the one heretofore made. Appellant's answer as to the shaft was that he had supposed it to be on the tract; and to the making of the explorations, he seems to have made no objection (p. 31). Under the advice and with the aid of one Johnson, a practical miner in that locality (p. 30) and Hume, the grandson of appellant, who resided on the tract, (p. 102) Bowman sank two shafts in search for a vein supposed to run under the mansion house, and three to the westward of the others and in search of a vein supposed to run north of the mansion house road. These explorations were without satisfactory result; but no injury or devastation was done to the property (p. 30). The cost of filling the shafts would not be much (p. 41). Nor is there any evidence that actual injury to the land or its market value, resulted from Col. Bowman's investigations, conducted, as they were, with notice of the purposes of the appellees, with the knowledge and without the objection of Dr. Grymes, and with the aid and advice of his grandson; and followed, as they were, by no complaint on the part of Dr. Grymes, and no request for farther exploration. The alleged injury to the property claimed by witness for appellant to have resulted from want of cultivation, damage to buildings, and the making of roads across it by parties at the Vancluse mines (pp. 28, 40 and 106), is not shown to have even partially occurred, until long

after the vendees had refused to retain the land. When Bowman went away, he requested one Gordon, with whom he had been boarding, to take charge of the land, and keep off trespassers and prevent injury, until he should receive written instructions from Repplier and Lanigan, to be based on their decision respecting the property. (pp. 102, 103). None being sent, Gordon wrote to Bowman, who, on September 24, answered; "I am directed by Mr. Repplier to say to you that he is not prepared to make any arrangements with you in relation to the Vancluse property at present (pp. 103, 112)." Afterwards, Gordon wrote to Repplier (p. 104), who, on October 20, answered that as he and Lanigan had been deceived in the property, they had given it up (p. 111). The contents of this letter were at once communicated to Dr. Grymes, (p. 102.)

Meanwhile, Catlett was endeavoring to get Repplier and Lanigan to compromise in some way with his principal, the appellant, or at least to defer taking any decided action in the matter. In his letter of September 6, (pp. 92, 93) he suggests a sale by Repplier and Lanigan in connection with the adjoining land which Catlett's firm controlled. In his letter of September 24, (p. 94) after acknowledging receipt of a letter from Repplier, instructing him to inform Dr. Grymes that he would throw up the contract and to demand return of the money, and after stating that there was no doubt about the mistake being caused by Hume's statement on the land, he says, "The only difficulty about it is the speedy recovery of the purchase money paid. Dr. Grymes, not dreaming of any trouble, loaned most of the money upon long time, upon small interest, and used the remainder to meet pressing obligations upon him." He then again suggests a sale, and goes on thus, "I feel very deeply this unfortunate mistake. I am anxious also on Dr. Grymes' account, who is old and feeble, and he will be worried by this trouble." Even as late as December 21st, Catlett wrote to Lanigan that he had received a letter from Orange, which induced him "to hope that Dr. Grymes will adjust the Vancluse matter before long, in a way that will be satisfactory to you;" and he therefore pleads for delay in these words, "I think if we give the Doctor a *little more time*, he will work out the matter himself, and we shall have nothing to do but close the arrangements. If we press him he may not so readily

comply" (p. 95). In his letter of September 25, he says, that on returning from West Virginia, he will at any time meet Lanigan and Repplier at Orange C. H., that he trusted that Dr. Grymes may arrange the matter without a suit, "as a suit in chancery in Virginia can be made almost interminable if lawyers desire to make it so." (p. 94). In October, he again refers to the desirability of a voluntary adjustment in preference to the probable length of a chancery suit. (p. 33).

In the spring of 1867, Dr. Grymes was still hesitating as to what course he should pursue in reference to the demand of Repplier and Lanigan for rescission of the contract. This appears from the testimony of Catlett, who, speaking of an interview, at that time, says, "Mr. Lanigan told Dr. Grymes, in substance, that not having gotten the property from him, which they supposed they were buying, that they wanted the money refunded. Dr. Grymes answered, in substance, that he did not have the money, having loaned it out and given part of it away; in reply to this, Mr. Lanigan said that he did not care about the money, and would give him any time he desired upon it. *Dr. Grymes responded that he would think about it and write to him or Mr. Repplier.* After some conversation about other things they parted. As far as I can recollect, this is what took place at that interview." (p. 90). Lanigan's account of this conversation is to the same effect, and he adds that Dr. Grymes never wrote as he promised to, and that Dr. Grymes left him under the impression that he would pay the $12,500. (pp. 24, 74, 75).

On September 21st, 1867, Catlett wrote to Lanigan, "Dr. Grymes has acted throughout with the same spirit of uncertainty that marked his interview with us when we were in Orange;" evidently referring to the indecisive conversation with Dr. Grymes in the previous spring, and to the still continuing uncertainty of purpose on the part of Dr. Grymes, as to whether he would refund the money.

In December, 1867, Repplier and Lanigan had a survey and plot of the premises made, in order to positively and authoratively fix the location of the shaft to which Hume had led Fisher and Catlett, and it was demonstrated to belong to a different tract from the one which Grymes had agreed to sell to them. Thus Fisher says: "I remained under the impression that the shaft was at the point on which I marked it on the plot, [the one fur-

nished by Dr. Grymes], until after the survey made by Hotchkiss, made more than a year afterwards. My idea was that the plot covered the shaft, but that Dr. Grymes had made some conveyance that he had forgotten, and that Williams and I had overlooked, in our examination." (p. 83). This fact is recognized by Dr. Grymes himself, in his answer (p. 15).

After the suit was begun, and defendant served with a process, (in March, 1868), Dr. Grymes continued the procrastinating and uncertain course which characterized his conduct from the time the mistake as to the location of the shaft was brought to his notice, and which had delayed the proceedings of Repplier and Lanigan.

A decree nisi was taken against him on the last Monday in April; and afterwards upon his continuing default, a decree pro confesso, was, on the first Monday of June entered against him, and the cause was set for hearing. Not until December 5th did he appear and file his answer, (p. 7).

From the foregoing it is concluded as a

SUMMARY OF THE FACTS,

That the contract of which rescission is sought was made by appellees under mistake, on their part, of a material fact caused by misrepresentation by the appellant or his agents; that as soon as the existence of the mistake was suspected, an effort was made to communicate with him; that when the mistake became apparent, rescission of the contract was demanded from him; that after discovery, or even suspicion, the appellees never, by unequivocal acts or otherwise, affirmed the contract; that their brief acts of possession and examination to ascertain the extent of the misrepresentations existed no longer than necessary, and were (with their purposes) known to the appellant, but were not objected to by him; that rescission of the contract, having been once demanded, was always afterwards insisted upon; that the land was offered back to him in substantially the same condition in which it was when sold, and that the reasonable period which afterwards elapsed before bringing this suit was occupied by the appellees in unsuccessful negotiations and praiseworthy efforts for adjustment without litigation, and by procrastinating pretexts on the part of the appellant and his agents.

POINTS AND AUTHORITIES.

I. Where an unconscionable advantage has been gained by mere mistake or misapprehension, and there was no *gross negligence* on the part of the plaintiff, either in falling into the error or in not sooner claiming redress, and no intervening rights have accrued and the parties may still be placed *in statu quo*, equity will interfere in its discretion in order to prevent intolerable injustice. 1 Story Eq. Jurisp. sec. 138 i. The general rule is that an act done or contract made under a mistake or ignorance of a material fact is voidable and relievable in equity, and this applies not only to cases of studied suppression or concealment of fact but to many cases of innocent ignorance and mistake on both sides. Equity will often relieve, however innocent the parties may be. Id. secs. 140, 142. "It is one of the most familiar duties of the Chancery Court to relieve against mistake, especially when it has been produced by the adverse party." Rhode Island *vs.* Massachusetts, 15 Pet. 271. If money has been paid, it will be decreed to be paid back. The injured party is placed in the same situation, and the other parties compelled to do the same acts, as if all had been transacted with the utmost good faith. 1 Story Eq. Jurisp. Sec. 439. "It is equally promotive of sound morals, fair dealing and public justice and policy that every vendor should distinctly comprehend not only that good faith should reign over all his ~~contract~~ conduct in relation to the sale, but that there should be the most scrupulous good faith and exalted honesty, or, as it is often felicitously expressed, *uberrima fides* in every representation made by him, as an inducement to the sale." Doggett *vs.* Emerson, 3 Story 733.

II. Where a sale made by an agent is ratified by his principal, the agent's representations made at the sale bind his principals. Doggett *vs.* Emerson, 3 Story, 700; Mason *vs.* Crosby, 1 Wood & Minot, 342; Smith *vs.* Babcock, 2 Wood & Minot, 293. If the principal avails himself of the sale, he must "be bound by it, *cum onere*, and with all the incidents * * *. The defendants cannot avail themselves of the contract, as a sale by their agent, and repudiate the accompanying representations * * *. The representations are a part of the *res gestæ*, and not separable from the sale." Doggett *vs.* Emerson, 3 Story, 735, 736.

III. The party defrauded may keep the question open, so long as he does nothing to affirm the contract. So long as he has made no election, he retains the right to determine it either way, subject to this, that if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position of the wrong doer is affected, it will preclude him from exercising his right to rescind. Clough *vs.* Railway Co., 7 Law Rep. (Exch.) 34, 35.

IV. Lapse of time may be evidence, and if great, will probably be conclusive evidence of determination to affirm a contract. It is an important consideration where, being unexplained, it has continued so long as to create a presumption of acquiescence in the wrong, or as to involve such laches and negligence by the injured party as to no longer entitle him to the countenance of a court of equity, by analogy to the statute of limitations at law. Rhode Island *vs.* Massachusetts, 15 Pet., 272. Or where, in the time between discovery and prosecution, great and material changes have taken place in the character and value of the property, or rights of third parties have intervened, or the party complained of has been deprived of substantial remedy. Dogget *vs.* Emerson, 3 Story, 700; Mason *vs.* Crosby, 1 Wood. & Minot, 342; Smith *vs.* Babcock, 2 Wood. & Minot, 246–293. But the offer to rescind need only be made within a reasonable time after discovery (by means of actual experiment) of the mistake or misrepresentation. Actual and substantial injustice not resulting to the vendor, he cannot complain of subsequent delay in filing the bill. Taylor *vs.* Fleet, 1 Barb. 471 (per Harris, J.). And after lapse of several years, accompanied by possession, between the discovery or the application to rescind and the filing of the bill, the pendency of negotiation for adjustment is sufficient justification. Mason *vs.* Crosby, 1 Wood & Minnot, 342. Delay in bringing suit of two years after completion of the sale, and of one year after discovery of the misrepresentation, has been held not to bar the complainants' right to rescission. ~~Doggett *vs.* Emerson, 3 Story, 700.~~

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